and I direct that the respondents' solicitor's bill of costs be taxed on the High Court scale.

Appeal dismissed.

Solicitors: *Dharmananda & Co.; T. C. Tang & Co.*

HARUN v. PUBLIC PROSECUTOR

[F.C. (Thomson L.P., Harley Ag.C.J. (Borneo) and Raja Azlan Shah J.) April 25, 1966]

[K.L. — Federal Court Criminal Appeal No. X. 7 of 1966]

Penal Code, s. 302 — Murder — Defences of insanity and provocation — Onus of proving insanity — Quantum of proof.

In this case the appellant had been convicted of murder. The defence of insanity was raised but no evidence was called by the defence to support it. On the defence of provocation which was raised, the trial judge directed the assessors as follows:— "I am in no way satisfied on balance of evidence, bearing in mind both the events of the previous day and those on the morning of the 21st July, that the accused was so gravely and suddenly provoked as to be deprived of his self-control when he struck Maria. Nor has he raised doubts in my mind which should be resolved in his favour".

Held: (1) if the defence wished to raise the defence of insanity it was for them to call evidence to provide a foundation for it. It was not for the prosecution to call evidence to show that he was sane; it was for the defence to call evidence to show that he was insane;

(2) the passage in the summing up of the learned trial judge on the issue of provocation, taken as a whole, correctly stated the law regarding the quantum of proof.

Cases referred to:—

(1) *R.* v. *Oliver Smith* 6 Cr.App.R. 19.

(2) *Kwaku Mensah* v. *The King* [1946] A.C. 83.

FEDERAL COURT.

Shelley Yap for the appellant.

Idris bin Yusoff (Deputy Public Prosecutor) for the respondent.

Thomson L.P. (delivering oral judgment): This appellant was convicted for murder in the High Court in Borneo and sentenced to death. The charge against him was that on 21st July last year at Pamol Estate near Sandakan he killed a woman Maria in contravention of section 302 of the Penal Code.

Against his conviction he has now appealed.

It has never been in question, it has never been denied and at the trial it was proved up to the hilt, that the appellant killed the deceased woman by striking her 3 times in vital parts of her body with a "parang".

For some time previous the appellant, who was a young man of some 21 years of age, had been living as a lodger with the deceased woman and her husband, and there is no question that during that period the deceased woman, who seems to have had a very strong personality, had behaved in a very domineering way towards her young lodger. I think that I should observe at this stage, in fairness to the deceased, that there has never been any suggestion of any impropriety between the deceased woman and the appellant. Nevertheless the deceased woman does appear to have treated the appellant in a very domineering way and although there is considerable conflict of testimony at the trial as to the extent of this treatment there is no question that on a least one occasion the deceased woman beat the appellant. It was on the morning after this beating that the appellant, in circumstances which have not been related in detail, attacked the deceased woman and killed her.

At the trial, which was before a judge with the aid of assessors, there was no real question as to the killing, the only defences being temporary insanity and grave and sudden provocation as defined in the first exception to section 300 of the Penal Code.

Before us the attack which has been launched against the conviction by Mr. Yap, and it has been one of very great persuasiveness, has been based on the way in which these two defences were dealt with at the trial.

As regards insanity the assessors were of the opinion that the defence was not made out and the judge agreed with them.

At the trial no foundation whatsoever was laid for that defence. On 29th November, 1965, the appellant had been certified mentally unfit to stand his trial but when the trial commenced on 9th February, 1966, a letter was produced from the same physician who had said he was unfit to stand his trial some months earlier and that letter was to the effect that the appellant showed normal mentality and was fit to be present in court for criminal trial. The judge clearly accepted that, and in our view accepted it rightly, as a certificate in accordance with section 286 of the Criminal Procedure Code of Sabah and counsel for the defence expressly said he did not suggest that the appellant was unfit to stand his trial. Clearly there was some medical evidence as to the appellant's state of mind and if the defence wished to raise the defence of insanity it was for them to call evidence to provide a foundation for it. It was not for the prosecution to call evidence to show that he was sane. It was for the defence to call evidence to show that he was insane (see *Oliver Smith* [1]).

With regard to provocation the assessors took the view that there was provocation so as to reduce the killing to culpable homicide not amounting to murder. The judge, however, disagreed.

In this connection the judge, in our view,

correctly directed himself and directed the assessors as to the nature of the defence of provocation and as to the *quantum* of proof regarding it. What he said with regard to himself is:—

"I am in no way satisfied on balance of the evidence, bearing in mind both the events of the previous day and those on the morning of the 21st July, that the accused was so gravely and suddenly provoked as to be deprived of his self control when he struck Maria."

If he had stopped there he would have been wrong. But he went on:—

"Nor has he raised doubts in my mind which should be resolved in his favour."

In our view that passage taken as a whole correctly states the law regarding the *quantum* of proof as explained in the African case of *Kwaku Mensah* v. *The King*.[2]

There was ample evidence which when viewed in the light of that statement supported the judge's views that the case was one of murder and not of culpable homicide not amounting to murder. There was no question of inadmissible evidence. In the circumstances we do not think we are justified in interfering with the conviction.

The appeal is dismissed.

Appeal dismissed.

LEE HOO BOON v. PUBLIC PROSECUTOR

[F.C. (Thomson L.P., Harley Ag.C.J. (Borneo) and Raja Azlan Shah J.) April 26, 1966]

[K.L. — Federal Court Criminal Appeal No. X. 11 of 1966]

Internal Security — Consorting with armed Indonesians — Possession of arms and ammunition — Availability of defences of mistake and accident under Penal Code — Admissibility of statement by accused — Application to refer to statements by witnesses.

Geneva Conventions Act, 1962 — Whether accused a Johore national — Whether prisoner of war — Whether entitled to benefit of Geneva Conventions — Construction of conventions and treaties — Internal Security Act, 1960, ss. 57 & 58.

The appellant was convicted on charges of consorting, possession of arms and possession of ammunition in contravention of sections 57(1)(a), (b) and 58(1) of the Internal Security Act, 1960. The evidence connecting the appellant with the items of ammunition mentioned in the charge was very tenuous and on appeal this was conceded and the conviction on this charge was set aside. The other grounds of appeal were (a) the statement made by the appellant to the police was wrongly admitted in evidence, as it was made under the influence of physical attacks previously made on the appellant. There was also the possibility of misunderstanding because the appellant and the police officer who took the statements from him spoke different dialects of the Hokkien dialect, (b) the trial judge wrongly refused to refer to statements made to the police by two Indonesian witnesses, (c) the appellant was entitled to the defences of mistake and accident under the Penal Code because when the appellant and the other Indonesians left Indonesia in the aircraft they were of the impression that they were on a practice flight and not on an invasion of Malaysia and (d) on the evidence the appellant was a member of the Indonesian military forces (he was wearing Indonesian military uniform at the time of arrest) and that he was a prisoner of war and was therefore entitled to the benefit of the Geneva Conventions although this matter was not raised at the trial.

Held: (1) the statement of the appellant was rightly admitted, as the learned trial judge had rejected the appellant's story and found that the statement was voluntary. As there was evidence to show that persons speaking the Hokkien dialect can understand each other irrespective of whatever variety of the dialect of that language was spoken and as there was no evidence to the contrary the court was not prepared to hold that there was any possibility of misunderstanding between the appellant and the police officer who took his statement;

(2) the learned trial judge was wrong in refusing the invitation by counsel to refer to statements made by the witnesses but the case fell within the proviso to section 60(1) of the Courts of Judicature Act, 1964 as there had been no substantial miscarriage of justice;

(3) although the appellant was entitled to avail himself of the defences set out in the Penal Code. this ground of appeal was without any substance in view of what the court had already said in *Tan Hua Lam* v. *Public Prosecutor;* [1]

(4) as the appellant was born in Johore it must be presumed that whatever the position as regards his citizenship he was a Johore national and was therefore not entitled to the benefit of the Geneva Conventions.

[Editorial Note: This case was dissented from by the Federal Court in *Ooi Hee Koi* v. *Public Prosecutor* and *Ooi Wan Yui* v. *Public Prosecutor*, reported at p. 183 *post*.**]**

Cases referred to:—

(1) *Tan Hua Lam* v. *Public Prosecutor* [1966] 1 M.L.J. 147.

(2) *Clifford* v. *O'Sullivan* [1921] 2 A.C. 570.

FEDERAL COURT.

C. Thambiah for the appellant.

Nik Saghir bin Mohamed Noor (Deputy Public Prosecutor) for the respondent.

Thomson L.P. (delivering oral judgment): This is another appeal arising from the Indonesian invasion which took place at Labis on the night of 1st /2nd September, 1964. The present appellant was thought to have been one of the persons who took part in that invasion and in consequence he was prosecuted on charges of consorting, possession of arms and possession of ammunition in contravention of sections 58(1), 57(1)(a) and 57(1)(b) of the Internal Security Act, 1960. He was convicted on all three charges and sentenced to death.

Against these convictions he has now appealed.

There are numerous grounds of appeal which have been argued, if I may say so, extremely competently and extremely persuasively, but not all of them merit consideration.

Before proceeding to deal with those which in our view do merit consideration, and at least